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IN THE

Supreme Court of the United States

October Term, 1959
No. 835

WYOMING CONSTRUCTION COMPANY, a Wyoming corporation; and MONOLITH PORTLAND MIDWEST COMPANY, a corporation,

Petitioners,

vs.

THE WESTERN CASUALTY AND SURETY COMPANY, a corporation; FORGEY CONSTRUCTION COMPANY, a WYOMING corporation; and ORRIN B. FORGEY, RUSSELL FORGEY, CHAS. S. CHAPIN and W. J. MCNAMARA, individually and as co-partners doing business as FORGEY BROTHERS,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

PETITION FOR CERTIORARI.

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SUBJECT INDEX

PAGE

Opinion below 2

Jurisdiction 2

Questions presented 2

Statutes involved 4

Statement 4

Reasons for granting the writ 7

I.

A subcontractor obligated to complete by a specified date has a correlative right to a complete worksite by such date. The contractor's admitted failure to furnish such site is a breach of the subcontract 7

II.

An experienced corporate surety with actual knowledge of a defense which exonerates it and its subcontractor patron, may not, in good faith, waive such defense at the expense of its patron 9

III.

The opinion of the Court of Appeals, holding a parent corporation liable for its subsidiary's breach of a contract entered into prior to the parent-subsidiary relation, where the subsidiary is financially responsible is in conflict with all authorities applying the instrumentality rule 10

IV.

Where plaintiff in a breach of contract action seeks to bring in a defendant corporation's parent corporation for actual fraud by amended complaint filed five years after the alleged fraud, such action was barred by the Wyoming four-year statute of limitations 14

PAGE

V.

The trial-court's ex parte addition of interest to a jury verdict, after discharge of the jury, where the verdict differs from the original "claim" and the complaint, and evidence was required to establish the amount and value of plaintiff's expenses sued for, and the Court of Appeals approval thereof, is in direct conflict with the law of Wyoming..... 15

A. Decision of the interest question is in direct conflict with, and is a refusal to follow the law of Wyoming as laid down by the Supreme Court of Wyoming..... 15

B. The court's reliance upon American Surety Company, etc. v. Carbon Timber Company, 263 Fed. 295, is misplaced 17

Conclusion 19

Appendices:

Appendix I. Opinion of the United States Court of Appeals, Tenth Circuit ..... App. p. 1

Appendix II. Excerpts from Record..... App. p. 17

TABLE OF AUTHORITIES CITED

CASES — PAGE

American Surety Company, etc. v. Carbon Timber Company, 263 Fed. 295 ..... 17, 18
Anderson v. Abbot, 321 U. S. 349 12
Barnard-Curtis Co. v. U. S. for Use of D. W. Falls Const. Co., 257 F. 2d 565, cert. den. 358 U. S. 906 8
Bass v. Shutan, 259 F. 2d 561 12
Binning v. Miller, 60 Wyo. 114, 146 P. 2d 527 19
Burnet v. Clark, 287 U. S. 410 12
Caldwell v. Roach, 44 Wyo. 319, 12 P. 2d 376 13
Certain—Teed Products Corp. v. Wallinger, 89 F. 2d 427 12
Dawson, Corbett & Shelp v. Lieurance & Canfield Const. Co., 68 Wyo. 465, 235 P. 2d 457 ..... 16, 18
Erie R. Co. v. Tompkins, 304 U. S. 64 16
Fish v. East, 114 F. 2d 177 13
Francis O'Day v. Shapiro, 267 F. 2d 669 13
Gardner v. The Calvert, 253 F. 2d 395, cert. den. 356 U. S. 960 13
Great Lakes Const. Co. v. Republic Creosoting Co., 139 F. 2d 456 8
Guerini Stone Co. v. P. J. Carlin Const. Co., 248 U. S. 334 8
Hudson v. Wylie, 242 F. 2d 435, cert. den. 355 U. S. 828 12
Johnson v. Hanover Fire Ins. Co., 59 Wyo. 120, 137 P. 2d 615 19
Kraft Foods Co. v. C. I. R., 232 F. 2d 118 12
Leet v. Joder, 75 Wyo. 225, 295 P. 2d 733 16
Maule Industries, Inc. v. Gerstel, 232 F. 2d 294 12
New Colonial Ice Co. v. Helvering, 292 U. S. 435 12
North Drive-In Theatre Corporation v. Park-In Theatres, Inc., 248 F. 2d 232 17

PAGE

Northeast Clackamas County Elec. Co-op. v. Continental Casualty Co., 221 F. 2d 329 8

Schenley Distillers Corp. v. United States, 326 U. S. 432 12

Studer v. Rasmussen, 344 P. 2d 990 8

T. & N. Transp. Co. v. S. W. Shattuck Chemical Co., 158 F. 2d 909 17

Taylor v. Standard Gas & Electric Co., 306 U. S. 307 ..... 10, 12, 13

United States v. Peck, 102 U. S. 64 8

STATUTES

United States Code, Title 28, Sec. 1254(1) 2

Wyoming Compiled Statutes (1945), Anno., Sec. 3-506 ..... 4, 14

Wyoming Compiled Statutes (1945), Anno., Sec. 39-1104 4

TEXTBOOKS

Latty, Subsidiaries and Affiliated Corporations (1936) 13

Powell, Parent and Subsidiary Corporations (1931) 13

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

PETITION FOR CERTIORARI.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit herein, made and entered on January 26, 1960.

Opinion Below.

The opinion of the Court of Appeals for the Tenth Circuit has not yet been reported but is reproduced in the Appendix to this Petition at page 1. Rehearing was denied without opinion on February 24, 1960. The jury verdict in the United States District Court for the District of Wyoming [R. 137-138], and judgment [R. 159], are reproduced in the Appendix at pages 18, 22.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

Questions Presented.

1. Where placement by a contractor of a dirt embankment necessarily must precede a subcontractor's placement of rock on top of such embankment on the face of a dam, is the contractor's failure to complete such precedent dirt work by the date and within the work season fixed for the subcontractor's completion, a breach of the rock subcontract, or do the standard provisions for non-liability for ordinary delays in the Bureau of Reclamation prime contract excuse such contractor's non-performance and failure to furnish the subcontractor a worksite within the contract period and contracted work season?

2. May a compensated corporate surety with actual knowledge of a defense which would exonerate it and its subcontractor patron, in good faith counsel and persuade the subcontractor to continue his performance through an unanticipated onerous winter and second work season, and thereafter recover for a subsequent non-completion by the subcontractor caused by the increased expenses and losses he had incurred?

3. May the corporate entities be disregarded to hold a parent corporation jointly liable with a *bona fide* separate subsidiary for directing its subsidiary to cease performance of a construction contract made by the subsidiary with a third party prior to the parent's acquisition of the subsidiary, where the subsidiary is solvent and financially well able to respond for all damages claimed for such breach; that is, is a directed breach of contract the "fraud or injustice" required to justify piercing the corporate veil of the parent corporation?

4. Where five and one-half years after the acts complained of, and one year after commencement of a contract action against a subsidiary corporation a plaintiff amends his complaint and alleges actual fraud by the parent corporation as justification for piercing the corporate veil, but proves merely a breach of contract by the subsidiary directed by the parent; is the applicable statute the four-year statute of limitations for fraud under which the action against the parent would be barred, or is it the ten-year statute for an action on a written instrument applied by the Court of Appeals?

5. May a trial court, after discharging the jury which has returned a verdict for $74,677.33 in favor of plaintiff surety in a subcontractor's indemnity action, add $25,701.45 "interest" to such verdict, when the verdict differs both from the prayer of the complaint and the "claim" on which the right to interest is predicated, and when evidence was required to establish the value of the services and expenses for which the surety claims reimbursement; or, did such *ex parte* addition of interest violate the Wyoming rule that interest cannot be added to unliquidated demands, and/or invade the province of the jury?

Statutes Involved.

The relevant and pertinent statutes are Wyoming Compiled Statutes (1945) Annotated, Sections 3-506 and 39-1104.

Section 3-506 provides that the Statute of Limitations shall be for four (4) years for:

> ". . . an action for an injury to the rights of the plaintiff, not arising on contract and not hereinafter enumerated; and action for relief on the ground of fraud; but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud. . . ."

Section 39-1104 provides:

> "Rates on money due. On money due on any instrument in writing, in the absence of contract specifying the rate, or on settlement of an account from the day balance shall be agreed upon; on money received to the use of another, and retained without the owner's consent, express or implied, from the receipt thereof, and on money loaned or due, and withheld by unreasonable delay of payment, interest shall be allowed at the rate of seven (7) per cent per annum. Unsettled accounts shall bear interest after thirty (30) days from the date of the last item thereof."

Statement.

Appellee-plaintiff, Western Casualty and Surety Company, a compensated, surety on a construction contract performance bond, brought this action for indemnity of its costs in completing the contract after its principal, Wyoming Construction Company was declared in default for failing to complete its performance [R. 10].

The United States, acting through the Bureau of Reclamation, Department of the Interior, contracted with S. J. Groves & Sons Company for the construction of the Big Sandy Dam and Dike in Western Wyoming [Ex. A, 90]. Groves subcontracted the earth embankment and the riprap (rock) which was to be placed on the face of the embankment to Forgey Construction Company [R. 951], which in turn, subcontracted the riprap work to Wyoming Construction Company [R. 37]. Western was the surety on the performance bond given by Wyoming to Forgey [R. 15-28]. All contracts called for completion by November 29, 1951. Forgey's placement of the embankment necessarily had to precede Wyoming's placement of riprap. (App. I, p. 2.) On November 29, 1951, prior to any extension of time, Forgey had failed to complete the embankment, and Wyoming, counseled by its surety Western [R. 859], continued to work through a difficult Wyoming winter, at greatly increased expenses [R. 968].

Subsequently, in January, 1952, Wyoming borrowed twenty-five thousand dollars from Monolith Portland Midwest Company to help finance the losses it was incurring on the dam job. Monolith acquired stock control of Wyoming in return, subject to an option to repurchase which was never exercised. (App. I, p. 10.)

Thereafter, in June, 1952, Wyoming's equipment was in poor shape and its management temporarily ceased performance after having worked straight through the winter, while Forgey laid off. Forgey declared a default [R. 308-309], and Western sought the written guaranty of Monolith that Monolith would underwrite Wyoming's further performance [R. 351-352]. Monolith refused to do so and Western took over the job.

In August, 1956, Western sued Wyoming for reimbursement of the expenses Western claimed it incurred in performing the riprap work. Subsequently, in June, 1957, by Amended Complaint, filed over Monolith's objection, Western added Monolith as a defendant, alleging that Wyoming was a "mere sham" and the instrumentality of Monolith, and that Monolith had been guilty of actual fraud and deceit in allegedly failing to allow Wyoming to complete performance [R. 90-94].

Following a trial to a jury in December, 1957, and a verdict in favor of Western and against Wyoming and Monolith for $74,677.33 [R. 137] the Court added $25,701.45 as interest from January 23, 1953 [R. 157] the day on which Western advised Wyoming that its expenses of completion were $82,228.81 [Ex. 7 (R)].

The Court below affirmed the judgment, held that Wyoming had no right to a complete worksite within the contract term, and approved the trial court's actions in allowing the amended complaint to be filed, limiting instructions, and adding interest after discharge of the jury. (App. I, pp. 1-16.)

REASONS FOR GRANTING THE WRIT.

I.

A Subcontractor Obligated to Complete by a Specified Date Has a Correlative Right to a Complete Worksite by Such Date. The Contractor's Admitted Failure to Furnish Such Site Is a Breach of the Subcontract.

It is undisputed that Forgey failed to complete the earth fill embankment by November 29, 1951—the common completion date (App. I, p. 2) and that it was apparent Forgey could not complete as early as September, 1951 [App. I, p. 3; R. 539, 654, 717, 939]. It is also undisputed that Wyoming could not complete its performance within the agreed contract period until Forgey had completed the precedent dirt embankment (App. I, p. 2), and that Forgey's failure to complete the precedent earth work converted Wyoming's contracted 1951 one-season performance into a different, more costly, and onerous two season summer-winter-summer performance [App. I, p. 4; R. 648]. Finally, it is undisputed that not only had no extension of the contract completion date been granted by the Bureau of Reclamation prior to November 29, 1951 [Third Party Ex. II-KK] but that Forgey had in writing expressly refused to grant any extension of time to Wyoming [R. 908, see also: R. 308, 831], regardless of what the Bureau of Reclamation did.

The Court below treated this question as one of fact—resolved by a jury verdict adverse to petitioners. Petitioners respectfully submit that on the undisputed ultimate facts conceded by the opinion of the Court of Appeals,

the question is purely a question of law, and that the Court of Appeal's opinion is in conflict with its own decisions, the decisions of this Court and other Courts of Appeal, and contrary to the Wyoming decisions which are controlling in this diversity case holding that a contractor is entitled to a complete worksite within the contract period, and that even where an ordinary delay provision exists it cannot be honored, if it results in a materially different performance for the subcontractor who has been delayed by the default of his contractor.

United States v. Peck, 102 U. S. 64;

Guerini Stone Co. v. P. J. Carlin Const. Co., 248 U. S. 334;

Barnard-Curtis Co. v. U. S. for Use of D. W. Falls Const. Co., 257 F. 2d 565 (C. A. 10th 1958), cert. den. 358 U. S. 906;

Northeast Clackamas County Elec. Co-op. v. Continental Casualty Co., 221 F. 2d 329 (C. A. 9th 1955);

Great Lakes Const. Co. v. Republic Creosoting Co.; 139 F. 2d 456 (C. C. A. 8th 1943);

Studer v. Rasmussen, ... Wyo. ...., 344 P. 2d 990 (1959).

The increasing importance of public-works contracts, and of the practice of subcontracting defense contracts; highlights the importance of reaffirmation by this Court of the basic contract principle that a contractor is entitled to a full opportunity to perform, and that a materially different performance can not be imposed upon him.

II.

An Experienced Corporate Surety With Actual Knowledge of a Defense Which Exonerates It and Its Subcontractor Patron, May Not, in Good Faith, Waive Such Defense at the Expense of Its Patron.

It is undisputed that the surety, Western, had full knowledge of the Forgey non-completion within the contract period (App. I, p. 5). It is undisputed that such multi-million dollar corporate surety, counselled and persuaded Wyoming (a small corporation with a book value of $98,000) to continue winter performance after Forgey's non-completion, in order to avoid "a hell of a lot" of argument [App. I, p. 7; R. 968], knowing that Wyoming would be "badly beaten up" financially in the process [Ex. 126, R. 859]; but not advising Wyoming of such informed conclusion.

Under these admitted circumstances, petitioners submit that as a matter of law, the surety could not, in good faith, unilaterally "waive" such defense to Wyoming's prejudice. This is peculiarly true, since Wyoming's profits from other contracts were swallowed up by the costs of such materially different winter performance, and this led to the subsequent temporary cessation of performance preceding Western's taking over the job in July, 1952 (App. I, pp. 7-8, 9-11). Western's subsequent loss was directly and proximately caused by its failure to assert a known, valid defense on December 1, 1951, knowing the probable consequences [Ex. 126, R. 859].

Such issue of "good faith" was withdrawn from the jury by the trial court, who instructed the jury that his two special interrogatories [R. 137]—dealing only with

the question of whether Forgey or Wyoming defaulted in June of 1952—were determinative of "the other matters in controversy" [R. 876, 888-889]. As late as the hearing on a motion for new trial the court stated that such interrogatories covered "the only real issues in this law suit" [R. 893].

Petitioners submit that they were deprived of their right to jury trial by such limitation of issues, approved by the Court of Appeals.

III.

The Opinion of the Court of Appeals, Holding a Parent Corporation Liable for Its Subsidiary's Breach of a Contract Entered Into Prior to the Parent-Subsidiary Relation, Where the Subsidiary Is Financially Responsible Is in Conflict With All Authorities Applying the Instrumentality Rule.

The decision of the court below in the instant case (App. I, *infra*, pp. 1-16) represents a novel extension of the so-called "instrumentality" rule by holding that the corporate entity will be disregarded and the parent corporation held liable for directing its subsidiary to cease performance on a contract entered into prior to the parent's acquisition of stock control of the subsidiary, where the subsidiary is solvent and well able to respond for any damages assessed for such breach.

Although the court below pays lip-service to the established criterion of "fraud or injustice" required to justify disregarding the corporate entity (See, *e. g. Taylor v. Standard Gas & Electric Co.*, 306 U. S. 307, 322) the court below equates the mere breach of contract with such "fraud or injustice" by denominating such breach a "detriment" to the plaintiff and stating that it would be "inequitable and unjust" to permit the parent "to escape the consequences of its conduct." (App. I, p. 11.)

Although the field of parent and subsidiary corporations and their amenability to suit and liability for intercorporate acts is a knotty one, no reported case has yet held that a breach of contract or even a directed breach of contract is sufficient to constitute the "injustice" necessary to justify disregarding the corporate entity, in the absence of fraud or insolvency.

The record in the Court of Appeals was undisputed that both defendant corporations were bona fide, operating entities, that although plaintiff had alleged actual fraud as the ground for fixing liability on the parent company—Monolith—it was conceded at trial that absolutely no "fraud or wrongdoing" of any kind had occurred [R. 418-421], and that the criteria for invoking the instrumentality rule referred to by the authorities (inadequate capital, formal requirements not observed, etc.) were absent. It is also undisputed that defendant Wyoming Construction Company—the subsidiary—was at all times solvent and financially able to respond to any judgment for the damages prayed [R. 896].

The decision of the Court of Appeals, disregarding the corporate entity of the subsidiary—Wyoming Construction Company—does not purport to rest on any "fraud or injustice" to the plaintiff which would result at the time of trial if the corporate entity were not disregarded, but is based solely on the premise that the parent corporation's alleged direction to the subsidiary to cease performing a contract with a third party five years before trial was a "detriment" to plaintiff surety company at the time it occurred.

The question presented is thus whether the *alter ego* or instrumentality rule will be applied to hold a parent corporation jointly liable with the subsidiary for directing its

subsidiary to breach a contract with a third party (entered into prior to the parent's acquisition of control) where the subsidiary is solvent and financially able to respond for all the damages claimed for such breach.

The Court of Appeals held that the parent corporation was liable in such a situation.

Petitioners respectfully submit that such decision is in conflict with the principles established by this Court for application of the *alter ego* rule in private rights cases—that is, "fraud or injustice".

Burnet v. Clark, 287 U. S. 410 (1932);

New Colonial Ice Co. v. Helvering, 292 U. S. 435 (1934);

Taylor v. Standard Gas & Electric Co., 306 U. S. 307, (1939);

Anderson v. Abbot, 321 U. S. 349 (1944);

Schenley Distillers Corp. v. United States, 326 U. S. 432 (1946).

The decision of the Court of Appeals is also in conflict with decisions of other Circuits following the "fraud or injustice" rule.

Hudson v. Wylie, 242 F. 2d 435, 443 (C. A. 9th 1957) cert. den. 355 U. S. 828;

Bass v. Shutan, 259 F. 2d 561 (C. A. 9th 1958);

Kraft Foods Co. v. C. I. R., 232 F. 2d 118 (C. A. 2nd 1956);

Maule Industries, Inc. v. Gerstel, 232 F. 2d 294 (C. A. 5th 1956);

Certain—Teed Products Corp. v. Wallinger, 89 F. 2d 427 (C. C. A. 4th 1937);

Francis O'Day v. Shapiro, 267 F. 2d 669 (C. A. D. C. 1959);

Gardner v. The Calvert, 253 F. 2d 395 (C. A. 3rd 1958), cert. den. 356 U. S. 960;

Such decision is also in direct conflict with the earlier decisions of the Tenth Court of Appeals;

Fish v. East, 114 F. 2d 177 (C. C. A. 10th 1940);

Taylor v. Standard Gas & Electric Co., 96 F. 2d 693 (C. C. A. 10th 1938);

and finally, such decision is in conflict with the Wyoming decisions

Caldwell v. Roach, 44 Wyo. 319, 12 P. 2d 376, 380-381 (1932).

as well as the authorities on the subject of parent-subsidiary liability problems.

Powell, *Parent and Subsidiary Corporations* (1931);

Latty, *Subsidiaries and Affiliated Corporations* (1936).

Although the language of some of the cases in this field is somewhat general, no reported case has held that a parent corporation can be held for contract damages when its subsidiary is financially responsible, and the plaintiff will not be prejudiced by failure to pierce the corporate veil.

Since so much of the financial business of the country, involving billions of dollars annually, is transacted through the parent-subsidiary corporate device, the question presented by the decision of the Court of Appeals has importance far beyond its actual context.

IV.

Where Plaintiff in a Breach of Contract Action Seeks to Bring in a Defendant Corporation's Parent Corporation for Actual Fraud by Amended Complaint Filed Five Years After the Alleged Fraud, Such Action Was Barred by the Wyoming Four Year Statute of Limitations.

The original complaint was filed August 22, 1956 [R. 13] by amended complaint dated May 22, 1957 and *ex parte* ordered filed June 3, 1957 [R. 87], plaintiff complained that the alleged direction by Monolith to Wyoming in June, 1952 to cease performance was actually fraudulent as to Western and that Monolith could be held liable under the *alter ego* rule [R. 93-94]. Monolith seasonably objected to such filing, *inter alia* on the ground that such action was barred by the Wyoming four year statute of limitations for fraud [R. 107-109], but such objection was overruled.

On appeal to the Court of Appeals, Monolith assigned such action by the trial court as error [R. 4].

The Court below held that despite the fact that plaintiff pleaded and relied on alleged fraud (which admittedly was not present or proven), the Wyoming four year statute of limitations (Wyoming Compiled Statutes (1945) Annotated, Section 3-506) did not apply, and that the addition of Monolith as a defendant was not barred by limitations. (App. I, pp. 11-12.)

This point attains proportion when it is understood that Western used Monolith as a stalking horse before the jury, castigating Monolith and Monolith's counsel for the alleged "fraud" [R. 257-258, 865-866, 869-871], as to which the Court observed there was not even a "scintilla

of evidence" and which plaintiff admittedly completely failed to prove [R. 396-397, 421-422].

Although there are apparently no decisions of this Court or of the Courts of Appeal passing on the question of the appropriate statute of limitations in *alter ego*, or instrumentality rule cases, petitioners submit that at least in a case where the plaintiff relies on "fraud", as here, the applicable statute is the State statute covering "fraud" and not some different statute.

V.

The Trial Court's Ex Parte Addition of Interest to a Jury Verdict, After Discharge of the Jury, Where the Verdict Differs From the Original "Claim" and the Complaint, and Evidence Was Required to Establish the Amount and Value of Plaintiff's Expenses Sued for, and the Court of Appeals Approval Thereof, Is in Direct Conflict With the Law of Wyoming.

A. Decision of the Interest Question Is in Direct Conflict With, and Is a Refusal to Follow the Law of Wyoming as Laid Down by the Supreme Court of Wyoming.

Plaintiff furnished Wyoming a copy of a "Voucher for Final Payment" to the prime contractor [Ex. 7 (R)] on January 23, 1953. Such claim showed plaintiff's expenses were $82,228.81. (App. I, p. 13.) Thereafter, additional expenses were incurred and additional credits received [R. 838], which resulted in the prayer in plaintiff's complaint for $74,667.29 [R. 91]. The jury verdict, for $74,677.33 [R. 138] thus differed from both the "claim" on which interest was allowed, *and* the prayer.

The statement of the Court of Appeals that "the verdict was for the exact amount claimed due" (App. I, pp.

14-15) is clearly in error. The verdict was higher than the amount sought by the complaint, and lower than the amount originally claimed. Relevant excerpts from the record regarding the figures involved are found in Appendix H, pages 17-22.

Under *Erie R. Co. v. Tompkins*, 304 U. S. 64, state law controls in diversity cases. As the Court's opinion acknowledged (App. I, p. 13) the Wyoming law of interest is controlling here. And, as the Court's opinion acknowledged (App. I, p. 13) under the applicable Wyoming statute, interest may not be allowed on an "unliquidated claim."

Having come this far, the Court then resorts to *Colorado* cases in an effort to show that Western's claims here were "liquidated" under *Wyoming* law, and ignores the reasoning and the language of the appropriate Wyoming cases interpreting the requirement of the Wyoming statute that a claim be liquidated.

It is undisputed that evidence was required here to establish the amount and quantity of Western's claimed expenses and their value. Wyoming disputed the amount, quantity and value of such expenses vigorously [Exs. A-85, A-86, A-87], and presented serious and substantial questions to the jury as to the measurement of such claimed expenses. What was involved was not only whether such expenses were "reasonable", but whether, *in fact*, they were incurred and whether they were properly calculated and recorded, etc.

Therefore, under the decisions of:

Dawson, Corbett & Shelp v. Licurance & Canfield Const. Co., 68 Wyo. 465, 235 P. 2d 457 (1951);

Leet v. Joder, 75 Wyo. 225, 295 P. 2d 733 (1956).

Western's claim of January 23, 1953, was "unliquidated", and no interest was allowable, as a matter of law.

The Court's opinion that Western's claim was "liquidated" ignores the Wyoming decisions on this "liquidated" vs. "unliquidated" issue, and merely observes that (App. I, p. 14):

"The fact that a claim is disputed does not preclude the recovery of interest," citing two Colorado cases as authority.

Even the Colorado cases cited by the Court are no authority in this context, because in the case of *T. & N. Transp. Co. v. S. W. Shattuck Chemical Co.*, 158 F. 2d 909, 910 (C. C. A. 10th 1945), the action for freight undercharges under the I. C. C. Act was declared to be a "liability fixed by law" and hence, by law, "liquidated." So too, in the case of *North Drive-In Theatre Corporation v. Park-In Theatres, Inc.*, 248 F. 2d 232, 237 (C. A. 10th 1957), the claim was for royalties based on "simple mathematical calculations" "readily computable" from the face of the contract and the admitted facts, and hence, by definition, under the Colorado statute, they were "liquidated."

B. The Court's Reliance Upon American Surety Company, Etc. v. Carbon Timber Company, 263 Fed. 295, Is Misplaced.

The Court below relied on the *American Surety Company* case, and stated (App. I, p. 16):

> "As in the American Surety case the right to interest followed as a matter of law and did not involve any question of fact."

The case of *American Surety Company, etc. v. Carbon Timber Company*, 263 Fed. 295 (C. C. A. 8th 1919), is

clearly distinguishable from the instant case on three separate grounds.

First, the case there was tried to the court alone, and not to the jury, as occurred here. Thus, the court there had the fact finding power it did not here possess, and which the court here usurped from the jury when it added interest to the jury verdict.

Secondly, the case is distinguishable since the amount there was liquidated in that the surety admittedly paid out one lump sum on its undertaking and no question of the amount was involved. In this case, the surety, Western allegedly expended monies for numerous expenses and took in numerous receipts over a four-month period. Such expenses were questioned both as to fact of expenditure, amount, and propriety by Wyoming.

Third, the amount paid out in the *American Surety* case was "ascertained" by formula under the contract, whereas in this case, the surety did not pay any fixed amount in settlement, etc., but incurred numerous expenses in doing certain work, the exact amount, reasonableness and propriety of which were seriously questioned by Wyoming.

As discussed above, the question of the quantity, amount, and value of Western's "expenses" has no counterpart in any Wyoming case except the *Dawson* case, which the Court ignored.

In *Dawson, Corbett & Shelp v. Lieurance & Canfield Const. Co.*, 68 Wyo. 465, 235 P. 2d 457 (1951); an accounting type action between a general contractor and his subcontractor, the court on appeal disallowed the interest

prior to judgment although the proper payments depended upon a written instrument, stating (p. 465):

> "'Where, however, the demand is for something which requires evidence to establish the quantity or amount of the thing furnished, or the value of the services rendered, interest will not be allowed prior to judgment.' . . ."

See also to the same effect:

Binning v. Miller, 60 Wyo. 114, 146 P. 2d 527 (1944);

Johnson v. Hanover Fire Ins. Co., 59 Wyo. 120, 137 P. 2d 615 (1943).

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

April 4, 1960.

Respectfully submitted,

JOSEPH T. ENRIGHT,

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NORMAN ELLIOTT,

Of Counsel.

APPENDIX I.

Opinion of the United States Court of Appeals, Tenth Circuit.

United States Court of Appeals, Tenth Circuit. No. 5991. January Term, 1960.

Wyoming Construction Company, a Wyoming corporation; and Monolith Portland Midwest Company, a corporation, Appellants, v. The Western Casualty and Surety Company, a corporation; Forgey Construction Company, a Wyoming corporation; and Orrin B. Forgey, Russell Forgey, Chas. S. Chapin and W. J. McNamara, individually and as co-partners doing business as Forgey Brothers, Appellees.

Filed January 26, 1960.

Appeal from the United States District Court for the District of Wyoming.

Norman Elliott and Joseph Enright (Loomis, Lazear & Wilson; Corthell & King, and Enright & Elliott were with them on the brief) for Appellants.

William H. Brown and Edward E. Murane (Brown, Healy, Drew, Apostolos & Barton; Murane, Bostwick & McDaniel, and Donald E. Chapin were with them on the brief) for Appellees.

Before BRATTON, LEWIS and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

Appellee-plaintiff, The Western Casualty and Surety Company, a compensated surety on a construction contract performance bond, brought this action for indemnity to recover its costs in completing the contract after default by its principal.

The United States, acting through the Bureau of Reclamation, Department of the Interior, contracted with S. J. Groves & Sons Company for the construction of the Big Sandy Dam and Dike in western Wyoming. Groves subcontracted the earth embankment and riprap on the dam to Forgey Construction Company which, in turn, subcontracted the riprap work to Wyoming Construction Company. Western was the surety on the performance bond given by Wyoming to Forgey. Wyoming failed to complete and performance was taken over by Western. During the period involved, Wyoming became a wholly-owned subsidiary of appellant Monolith Portland Midwest Company. The jury verdict, in favor of Western and against Wyoming and Monolith, was for $74,677.33 to which the court added $25,701.45 as interest and entered judgment for $100,378.78.[1] This appeal is from that judgment.

Wyoming contends that Western is not entitled to indemnity because an antecedent default of Forgey relieved Wyoming of its obligation to perform and such default and its effect were known to Western. All pertinent contracts required completion of performance by November 29, 1951. The riprap work of Wyoming had to follow the placing of embankment by Forgey but could advantageously proceed as the embankment rose in height. On the contract termination date Forgey had placed more than 90% of the embankment materials and Wyoming had placed less than 10% of the riprap. The breach by

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[1]Wyoming brought in as third-party defendants Forgey Construction Company and Orrin B. Forgey, Russell Forgey, Chas. S. Chapin and W. J. McNamara, individually and as co-partners doing business as Forgey Brothers. The jury verdict was in favor of the third-party defendants. In this appeal the judgment in favor of the third-party defendants is not contested.

Forgey, upon which Wyoming relies, is the failure of Forgey to complete the embankment by November 29, 1951.

The issue as to whether Wyoming was excused from performance because of the alleged breach by Forgey was submitted to the jury under adequate instructions and the jury by its verdict adverse to Wyoming on all issues necessarily found that the conduct of Forgey did not excuse Wyoming. Substantial evidence in the record sustains such conclusion.

There were four principal stages in the riprap operation covered by the Forgey-Wyoming subcontract.[2] The material had to be quarried at a site about 26 miles from the dam, crushed to the right size, hauled by truck to the dam, and placed on the dam. Wyoming delayed in carrying out preparatory work such as building an access road and opening the quarry with the result that it did not start placing riprap until about the end of August 1951, when the embankment was more than 60% complete. An employee of Wyoming testified that at no time after Wyoming began operations in August was there unavailable an area for the placement of riprap. The inability of Wyoming to put on riprap as fast as the dam went up was due to inadequate crushing and loading equipment and to the lack of trucks for hauling.

The testimony of Wheeler, the president of Wyoming until June 1952, was that in September 1951 he, as the responsible executive of that company, decided that it would be impossible to complete by the contract date

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[2]The subcontract covered both "blanket materials and riprap." The operations are so connected that herein reference will be made only to riprap.

and that it would be necessary to work through the winter. The record shows that no failure of Forgey to complete the preliminary work hindered or delayed Wyoming and that Wyoming made no effort to keep up with the progress of Forgey. These facts, coupled with extensions of the termination date obtained with the assistance and acquiescence of Wyoming, require the conclusion that no default of Forgey relieved Wyoming of its duty to perform. The situation in which Wyoming found itself was the result of its own acts.

Wyoming next urges that "the extensions of the date for completion of performance were material alterations of the contract which discharged the surety. In support of this contention it points out that construction work in western Wyoming is more costly in winter periods because of severe weather conditions and that the contract contemplated the work would be completed before the winter season.

The contracts involved all provided for an extension of the performance date.[3] Chapin, an officer of Forgey, testified that prior to the execution of the Forgey-Wyoming contract he and Wheeler discussed the possibility "that this job would go into the winter or the following spring." As early as September 1951 Wheeler refused to commit more of the Wyoming equipment to the job because he then realized that winter work would be required. The matter of extension of performance time was

[3]In the Forgey-Wyoming contract it was provided that there might be no extension without the written consent of Forgey. The absence of such written consent may not be raised by Wyoming and it is not asserted by any other party. Neither Wyoming nor Forgey objected to the extensions and by their conduct acquiesced therein.

discussed in correspondence between the Bureau, Groves, Forgey, Wyoming and Western as Wyoming's surety. There is no evidence that any party, except the Bureau, was opposed to any extensions. The Bureau granted extensions, the last until July 17, 1952.

The failure to perform on time did not terminate the contract.[4] We are not concerned at this point with possible rights to damages for delay but with the issue of whether the extensions relieved the surety of liability. Western was a compensated surety. It knew from its own investigations that the job would not be completed on the contract termination date. As Wyoming had but 9.9% of its work done on the termination date it was to the advantage of both Wyoming and Western to have the date extended. Neither was harmed thereby.[5] Whatever additional costs there might have been to Wyoming were the result of Wyoming's conduct in failing to keep apace with Forgey.

This is not an action by an obligee to collect from a surety. Rather, it is an action by a surety which has performed in the place of its principal and which seeks to collect from its principal under a written contract of indemnity. That contract authorized the surety "to consent, from time to time, to any extensions, modifications, changes or alterations of, or additions to, said contract, * * *." While no formal written consent was

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[4]Barnard-Curtiss Company v. United States, 10 Cir., 257 F. 2d 565, 568 and authorities cited in note 10, certiorari denied 358 U. S. 906.

[5]Restatement of the Law, Security, § 129(2), p. 346, states the rule to be that where the principal (Wyoming) and the creditor (Forgey) without the surety's consent agree to an extension, a compensated surety is discharged only to the extent that it is harmed by the extension.

executed, the conduct of Western is consistent only with consent to the extensions.

The equities of the situation cry out against Wyoming. By starting late and using inadequate equipment it failed to keep abreast with the progress of Forgey. It lead all parties to believe that by winter work it would catch up with Forgey and complete the riprap promptly after the completion of the embankment. It did not object to the extensions but instead aided in their procurement. It failed to do the job it had contracted to do. Now, after the work has been completed by its surety and the surety seeks indemnity, Wyoming asserts that the situation which resulted from its wrong relieves if of liability to its surety. Such argument does not commend itself to the court. A party may not take advantage of its own wrong.[6]

The other claimed material alterations of the Forgey-Wyoming contract relate to the advance by Forgey to Wyoming of part of the purchase price of a crusher and numerous advances on a yardage basis to pay lease truckers. These advances were made by Forgey because of the financial condition of Wyoming. They were credited against payments to Wyoming when those payments became due. Granting that in some circumstances an advance payment may be a material alteration of a contract;[7] such is not the case here and even if it were Western knew of the payments and did not object to them. As the acts of Western were consistent only with a disposition to continue the suretyship relation, it waived whatever right it might have had to take advantage of

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[6]Wettlin v. Jones, 32 Wyo. 446, 234 P. 515, 517. *Cf.* R. H. Stearns Co. v. United States, 291 U. S. 54, 61.

[7]See 72 C. J. S. Principal and Surety §§ 133-134, pp. 622-627.

the changes in payment.[8] The advances were to the benefit of Wyoming. That company may not now hide behind its own acts and use the consequences thereof to avoid liability under the indemnity agreement.

Wyoming further says that Western breached its duty to act in good faith. We have no doubt that a surety must act in good faith in its dealings with its principal.[9] In the situation here, Wyoming knew the facts at least as well as its surety. The legal rights and obligations arising from those facts were known to both. There is no evidence of misrepresentation, concealment, overreaching, or undue persuasion on the part of Western. To the contrary, Western acted with candor and patience and gave Wyoming every opportunity to perform its contract.

Only one facet of the bad-faith charge merits comment. Wyoming says that Western acquiesced in Forgey's notice of default and did not assert the antecedent breach and material alteration defenses which were available. A sufficient answer is that such defenses, for reasons heretofore stated, were not available to either the principal, Wyoming, or to the surety, Western. Each, by its actions, had lost its right to assert those defenses, if either or both ever had such right. Be that as it may, the conditions existing at the time of the Forgey default notice and demand show that if there was any bad faith it was on the part of Wyoming, not on the part of Western.

As of May 31, 1952, Forgey was 99% complete and Wyoming 34%. In mid-June, Wyoming stopped the place-

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[8]Trinity Universal Insurance Company v. Gould, 10 Cir., 258 F. 2d 883, 886.

[9]*Ibid.*

ment of riprap, stacked its machinery and equipment, and laid off its employees other than supervisors. The work was at a standstill. By letter dated June 27, 1952, Forgey gave Wyoming a notice of default stating that it, Forgey, would take over the work on July 2, 1952. At the same time, Forgey notified Western to perform under its bond.

A meeting attended by all interested parties was held on July 14, 1952. Wyoming, then under the domination and control of Monolith, refused to finish the job and Western assumed the responsibility of completion. At the time no protest was made by either Wyoming or Monolith. The subsequent formal protest, which did not state any substantiating grounds, did not detract from the good faith of Western. Here again the equities are with Western, which performed, and against Wyoming, which defaulted.

Monolith asserts that as it is a corporate entity, separate and distinct from Wyoming, it may not be held for the breach by Wyoming of a contract to which it, Monolith, was not a party.

Western relies upon the so-called instrumentality rule under which it says that Wyoming is to be regarded as a department or agent of Monolith with the result that Monolith is responsible for the defaults of Wyoming.

In Taylor v. Standard Gas & Electric Co., 10 Cir., 96 F. 2d 693, 703-705, this court said that the instrumentality rule is not yet defined "with a degree of certainty that it can be applied as a precise yardstick in the admeasurement of legal rights," and referred to ten circumstances which are important and controlling if present in the proper combination. The Taylor decision was reversed by the United States Supreme Court in Taylor

v. Standard Gas & Electric Co., 306 U. S. 307, the Supreme Court saying, at page 322, that the instrumentality rule is not properly speaking a rule "but a convenient way of designating the application in particular circumstances of the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when so to do would work fraud or injustice."

In a recent case arising in Colorado, Fitzgerald v. Central Bank and Trust Company, 10 Cir., 257 F. 2d 118, 120, this court said that the conditions in which the fiction of separate corporate existence may be disregarded or the corporation treated as the alter ego of its members, necessarily vary according to the circumstances and "in general terms that the doctrine is an equitable one appropriate for application to prevent fraud, injustice, or wrong." Applicability of this rule in Wyoming is established by Caldwell v. Roach, 44 Wyo. 319, 12 P. 2d 376, 380-381, where it was said that "the legal entity of a corporation will be disregarded whenever the recognition thereof in a particular case will lead to injustice."

At the time of the execution of the Forgey-Wyoming contract the stock in Wyoming, with unimportant exceptions, was owned by Wheeler and his wife. Wyoming supplied gypsum to Monolith.[10] The Monolith contract was profitable to Wyoming, which did not allocate

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[10]Schoonoyer, the chief engineer of Monolith, testified: "* * * about 1950 or 1951, I don't recall the exact year when the U. S. gypsum plant at Laramie shut down and we were immediately forced to go out and find a source of gypsum. At that time Mr. Wheeler located a gypsum quarry for himself with the thought in mind of selling gypsum, so through desperation we bought gypsum from the Wyoming Construction Company." It was not until 1953 or 1954 that Monolith located its own gypsum deposit.

to the Big Sandy job equipment used on its gypsum production project.

In the fall of 1952 Wyoming was having financial trouble. It applied to Monolith for help. On January 14, 1952, Monolith advanced $25,000 which Wheeler, the president of Wyoming, considered an advance on a $75,000 open line of credit. On the same date all of Wyoming's stock was assigned to Monolith or its nominees with a repurchase option if the indebtedness was repaid.[11] It was not repaid and the option was not exercised.

As part of the January 14 transaction in which Monolith advanced the $25,000, Wyoming took appropriate corporate action to surrender completely its power to conduct its own business without the approval of Monolith.

Although Wheeler was continued as president of Wyoming until May 1952, his efforts to complete the Forgey contract were frustrated by the Monolith control. Monolith, which in January had advanced funds to Wyoming, refused additional financing. A Monolith employee, acting as an officer of Wyoming, shut down the job. When the meeting was held to determine what should be done about the completion of the Forgey contract, the Monolith employees who were acting as officers of Wyoming phoned their Monolith superiors for directions before stating the Wyoming position to proceed no further on the contract.

The assumption of ownership and control of Wyoming was to the advantage of Monolith because of the gypsum contract which Monolith had made "through desperation" when it lost its prior source of supply and

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[11] At the time of the stock assignment, the Wyoming stock had a book value of $98,000.

which was profitable to Wyoming. The decision to proceed no further with the Forgey contract was a detriment to Western as it was obligated under its performance bond. The facts justify the conclusion that Monolith was using Western and its property to the sole advantage of Monolith. That advantage was served by the abandonment of the Forgey contract.

Monolith emphasizes that there was no evidence of fraud but it is enough if the disregard of the corporate entity is required to prevent injustice. The issue was submitted to the jury under instructions, which, when taken as a whole and considered in their entirety, fairly and adequately set out the controlling principles. There was substantial evidence from which the jury could find that Monolith controlled and dominated Wyoming in the interests of Monolith and with full knowledge of the situation caused Wyoming to default on the Forgey contract with resulting detriment to Western. The verdict of the jury is sustained. It would be inequitable and unjust to permit Monolith to escape the consequences of its conduct.

Wyoming and Monolith say that the trial court erred in permitting the filing of the amended complaint which joined Monolith as a defendant. Amendments to pleadings are within the sound discretion of the trial court and should be granted freely as justice requires.[12] The impropriety of the allowance of amendment here is said to arise from the fact that any action against Monolith was barred by the applicable Wyoming statute of limitations. The theory is that the four-year statute covering

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[12]Rule 15(a), F. R. Civ. P.; Ziegler v. Akin, 10 Cir., 261 F. 2d 88, 90, certiorari denied 338 U. S. 822.

non-contract, fraud and tort actions applies.[13] On written contracts Wyoming has a ten-year statute,[14] on oral contracts, either express or implied, an eight-year statute,[15] and on actions for relief not otherwise limited a ten-year statute.[16] The only statute which would operate to bar the action against Monolith is the four-year statute. That does not apply because the action is on a written contract and Monolith is liable under the instrumentality theory approved by the Supreme Court in the Taylor case.

Wyoming contends that the amended complaint should not have been permitted because Western had violated an earlier order in aid of discovery. The situation is that the trial court ordered Western to make more specific answers to certain interrogatories. Supplemental answers were made and there was no objection of lack of specificity. The point is without merit.

Error is predicated on the submission of two interrogatories to the jury in accordance with Rule 49(b), F. R. Civ. P. The court advised the parties well in advance that it would submit these interrogatories. No objection was made. The verdict was consistent with the answers to the interrogatories. By failure to object the parties have waived the right to protest now. In any event the interrogatories were fair and pertinent and did not prejudice the right of any parties.

Various complaints are made against the instructions. A careful reading of the instructions convinces us that,

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[13] 1945 Wyo. Comp. Stat. § 3-506.

[14] *Id.* § 3-504.

[15] *Id.* § 3-505.

[16] *Id.* § 3-509.

considered as a whole, they fairly and adequately presented the issues and the controlling law to the jury. We find nothing therein which merits comment.

To the jury verdict assessing Western's damages at the sum of $74,677.33, the trial court added $25,701.45 as interest from January 23, 1953, the day when Western submitted to Wyoming an itemized statement of its expenses in completing the Big Sandy project. The award of interest is contested on the grounds that the amount due under the indemnity contract was unliquidated and that the court was without power to add interest to the verdict.

The contract was made and performed in Wyoming. This diversity action was brought in the United States District Court for the District of Wyoming. The law of that state controls to determine the right to interest.[17]

The applicable Wyoming statute[18] allows 7% interest on money due under a written instrument which does not specify the interest rate. Wyoming has held that under this statute interest may not be allowed on unliquidated claims.[19]

The itemized statement submitted by Western to Wyoming on January 23, 1953, showed the amount due to be $82,228.81. This was later reduced to $74,677.33 by adjustments favorable to Wyoming and secured through

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[17]T & M Transp. Co. v. S. W. Shattuck Chemical Co., 10 Cir., 158 F. 2d 909, 910; North Drive-In Theatre Corporation v. Park-In Theatres, Inc., 10 Cir., 248 F. 2d 232, 237.

[18]1945 Wyo. Comp. Stat. § 39-1104.

[19]*In re* Johnson's Estate and Guardianship, ... Wyo. ....., 320 P. 2d 429, 433; Hancock v. Johnson, 69 Wyo. 503, 244 P. 2d 285, 289; Dawson, Corbett & Shelp v. Lieurance & Canfield Const. Co., 68 Wyo. 465, 235 P. 2d 457, 464-466.

the diligence of Western.[20] These credits could have been obtained by Wyoming if it had then paid Western. The fact that the adjustments were made by Western does not convert the claim into one which was not liquidated. Wyoming was aided, not hurt, by the additional credits.

The attack by Wyoming on the necessity of certain expenses does not change the character of the claim. The fact that a claim is disputed does not preclude the recovery of interest.[21] The indemnity contract provided that the surety should be reimbursed for all expenses incurred in good faith whether necessary or not. Through an abundance of caution and without objection by any party, the trial court submitted to the jury the question of the necessity of the expenses,[22] and the jury returned a verdict for the exact amount which Western claimed. To permit a party to escape payment of interest by contesting the validity of a claim is to destroy the right to interest.[23]

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[20]The most important credit resulted from the action of Western in securing remission of penalties by the Bureau.

[21]North Drive-In Theatre Corporation v. Park-In Theatres, Inc., *supra*, p. 237; T & M Transp. Co. v. S. W. Shattuck Chemical Co., *supra*, p. 911.

[22]The pertinent instruction was: "Now, there are some items that are raised here as to whether an airplane was necessary in the completion of a job. There is other evidence that there was too much overtime paid, and I am sure that evidence is all clear in your mind. If you find for the Casualty Company then you shall take into consideration whether the $74,677 was the amount which they incurred in completing the job, less any expenses which you feel were unnecessary in the completion of the job."

[23]The language of the Supreme Court of Wyoming in Wyoming Ry. Co. v. Leiter, 25 Wyo. 286, 169 P. 1, 2, is appropriate and we quote: "The argument amounts to this: That plaintiff could not pay because it did not know the amount due for the reason that it objected to the amount found due. A very handsome method of avoiding the payment of interest on one's debts!"

In allowing interest the trial court acted on the authority of American Surety Co. of New York v. Carbon Timber Co., 8 Cir., 263 F. 295. This was a Wyoming case in which a surety on a timber contract sued for indemnity. The trial court denied interest and the court of appeals reversed saying that the amount was ascertained under and by virtue of specific authority of the indemnity contract and was a liquidated debt within the purview of the Wyoming statute. Wyoming and Monolith distinguished the American Surety Co. case on the ground that it was a trial to the court whereas here the trial was to a jury. The distinction is unimportant.

In Leet v. Joder, 75 Wyo. 225, 295 P. 2d 733, a denial of interest after jury verdict was upheld on the ground that in the circumstances of that case the right to interest was a question of fact for the jury rather than one of law for the court. After reviewing pertinent authorities, the court said that the power of a court to add interest to a verdict is based on the assumed failure of the jury to grant the plaintiff that to which he is entitled as a matter of law and that a court may not add interest when interest is a part of the damages or when it is impossible to ascertain whether the jury had included interest in the award on an unliquidated contract or claim.

This case does not come within either inhibition of the Leet decision. The jury was not instructed on the matter of interest.[24] The verdict was for the exact amount claimed due under the indemnity contract. There is nothing to suggest that interest was included in the amount of the verdict. Indeed, the record is entirely to the con-

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[24]Neither party requested such an instruction.

trary. This was an action on a written contract and does not involve the portion of the Woming statute considered in the Leet case.[25] As in the American Surety case the right to interest followed as a matter of law and did not involve any question of fact.

Affirmed.

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[25]There reliance was placed on the provision allowing interest "on money * * * due, and withheld by 'unreasonable delay' of payment."

APPENDIX II.

Excerpts From Record.

A. The Original Complaint

Plaintiff's original complaint, filed August 22, 1956 [R. 13], provided:

> "Wherefore, plaintiff prays for Judgment against the defendants and each of them in the principal sum of $74,667.29 and interest from October 19, 1955 until paid and for its costs herein incurred."

B. The Amended Complaint

Plaintiff's amended complaint, filed October 29, 1957 [R. 93-94] provides:

> "The from and after January 14, 1952 the corporate existence of Wyoming was a mere sham and was used by Monolith as an instrument of fraud."
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> * * * * * * *
>
> "That Monolith fraudulently refused to permit Wyoming to complete its said subcontract herein referred to. That undue domination and control was exercised by Monolith over Wyoming and so exercised as to defraud and wrong plaintiff herein."
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> * * * * * * *
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> "Plaintiff prays judgment against defendant Wyoming Construction Company, a corporation, and Monolith Portland Midwest Company, a corporation, in the principal sum of $74,667.29 with interest at 7% from January 23, 1953 until paid; and for its costs herein incurred."

C. The Special Questions To the Jury

The Court gave two special questions to the jury [R. 137] as follows:

"Special Questions For The Jury To Answer.

Question Number 1: Did Wyoming Construction Company abandon, default or breach its subcontract in the construction of the blanket and riprap on the Big Sandy Dam?

Answer: Yes (X) No. (....).

CALVIN L. SMITH, Foreman.

Filed Dec. 14, 1957.

Question Number 2: Did Forgey Construction Company, Orin B. Forgey, Russell Forgey, Chas. S. Chapin, Doe I, Doe II, Doe III, individually and as co-partners doing business as Forgey Brothers, obstruct, hinder, interfere or prevent Wyoming Construction Company from laying the blanket and riprap on said dam pursuant to its contract?

Answer: Yes (....) No (X).

CALVIN L. SMITH, Foreman.

Filed Dec. 14, 1957.

D. The Verdict

The Jury's Verdict was as follows [R. 137]:

"We, the jury empaneled in the above entitled case, upon the issues joined on the plaintiff's amended complaint, do find for the plaintiff, The Western Casualty and Surety Company, and against the defendants Wyoming Construction Company and Monolith Portland Midwest Company, and assess plaintiff's damages at the sum of $74,677.33.

CALVIN L. SMITH, Foreman.

Filed Dec. 14, 1957."

E. The Court's Ruling On Interest

The Trial Court, by letter to counsel, explained his *ex parte* addition of interest to the jury verdict as follows: [R. 157]

"December 23, 1957

Murane & Bostwick, Attorneys at Law, Wyoming National Bank Building, Casper, Wyoming, Corthell & King, Attorneys at Law, Albany Mutual Building, Laramie, Wyoming, Enright & Elliott, Attorneys at Law, 541 South Spring Street, Los Angeles 13, California, Loomis, Lazear & Wilson, Attorneys at Law, 202 East 18th Street, Cheyenne, Wyoming, Mr. William H. Brown, Jr. Attorney at Law, Consolidated Royalty Building, Casper, Wyoming, Mr. Donald E. Chapin, Attorney at Law, Consolidated Royalty Building, Casper, Wyoming

In re: The Western Casualty and Surety Company v. Wyoming Construction Company, et al., No. 4027 Civil.

Gentlemen: I have carefully considered the memorandum with respect to the verdict carrying interest from January 23, 1953, to and including the date of the entry of judgment on the verdict.

This is an action on a written contract executed by The Western Casualty and Surety Company and Wyoming Construction Company dated February 13, 1951. The written contract provides in part: in the event of any abandonment or forfeiture of the contractor's agreement by said obligation, or of any breach of said contract or said obligation * * * The Western Casualty and Surety Company may take possession of the work under said contract and complete the same at the expense of Wyoming Con-

struction Company. The agreement further provided that liability thereunder should extend to, and include, the full amount of any and all moneys paid by The Western Casualty and Surety Company in good faith, under the belief that it or they were liable therefore, whether liable or not, as well as any and all disbursements on account of costs, attorneys' fees and expenses as aforesaid, which might be made under the belief that such were necessary, whether necessary or not.

The jury trying the case answered in the affirmative the following question: 'Did Wyoming Construction Company abandon, default or breach its subcontract in the construction of the blanket and riprap on the Big Sandy Dam?' and rendered a verdict for the plaintiff, The Western Casualty and Surety Company, in the amount of $74,677.33.

It is the position of Wyoming Construction Company that said amount is not liquidated until the rendition of the verdict. Wyoming Compiled Statutes, 1945, Section 39-1104, provides: 'On money due on any instrument in writing, in the absence of contract specifying the rate, or on settlement of an account from the day balance shall be agreed upon; on money received to the use of another, and retained without the owner's consent, express or implied, from the receipt thereof, and on money loaned or due, and withheld by unreasonable delay of payment, interest shall be allowed at the rate of seven (7) per cent. per annum. Unsettled accounts shall bear interest after thirty (30) days from the date of the last item thereof.' (Emphasis supplied.)

Here we have as the subject of this controversy an agreement in writing, coupled both with an allegation and proof that on or about January 23, 1953, the Western Casualty and Surety Company, following the completion of the job, submitted to Wyoming Construction Company an itemized statement of the expenses incurred in the completion of the work on the Big Sandy Dam.

I am not able to distinguish the case at bar from the case of American Surety Company of New York v. Carbon Timber Company, et al., 263 Fed. 295, in which the Eighth Circuit, at a time when Wyoming was a member of the Eighth Circuit, construed the above Wyoming statute respecting interest.

The Clerk will forthwith enter judgment on the verdict bearing interest from January 23, 1953.

Very respectfully,

EWING T. KERR
United States District Judge.

ETK:kf
Filed Dec. 23, 1957."

F. The Plaintiff's January 23, 1953 "Claim"

On or about January 23, 1953 plaintiff submitted to defendant-petitioner, Wyoming Construction Company a copy of a "Voucher for Final Payment" made to the prime contractor [Ex. 7 (R)] in the sum of $82,228.81. Such Voucher did not demand payment from Wyoming.

G. Judgment

The trial court's judgment provided as follows: [R. 159]

"Judgment.

This cause having been tried to the Court and a jury and the jury having returned a verdict in favor of the plaintiff against defendants Wyoming Construction Company and Monolith Portland Midwest Company and a verdict in favor of the third party defendants against the third party plaintiff:

Therefore, It Is Ordered And Adjudged by the Court that the plaintiff, The Western Casualty and Surety Company, do have and recover of and from defendants Wyoming Construction Company and Monolith Portland Midwest Company the principal sum of Seventy-Four Thousand Six Hundred Seventy-Seven and 33/100 Dollars ($74,677.33), plus interest thereon at the statutory rate of seven per centum per annum from January 23, 1953, in the amount of Twenty-Five Thousand Seven Hundred One and 45/100 Dollars ($25,701.45), making a total sum of One Hundred Thousand Three Hundred Seventy-Eight and 78/100 Dollars ($100,378.78), together with its costs by it in this behalf expended, to be taxed.

It is Further Ordered And Adjudged by the Court that the third party defendants, Forgey Construction Company and Orrin B. Forgey, Russell Forgey, Chas. S. Chapin and W. J. McNamara, individually and as co-partners doing business as Forgey Brothers, go hence hereof without *day*, and have and recover of and from the third party plaintiff,

Wyoming Construction Company, their costs by them in this behalf expended, to be taxed.

Verdicts having been submitted to the jury on the counterclaim of defendant Wyoming Construction Company against the plaintiff and the jury having failed by a verdict to allow the claim of Wyoming Construction Company, the same is hereby denied.

Dated December 23, 1957.

EWING T. KERR, Judge.

Filed Dec. 23, 1957."

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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 835

WYOMING CONSTRUCTION COMPANY, a Wyoming corporation; and MONOLITH PORTLAND MIDWEST COMPANY, a corporation,
Petitioners,

vs.

THE WESTERN CASUALTY AND SURETY COMPANY, a corporation; FORGEY CONSTRUCTION COMPANY, a Wyoming corporation; and ORRIN B. FORGEY, RUSSELL FORGEY, CHAS. S. CHAPIN and W. J. McNAMARA, individually and as co-partners doing business as FORGEY BROTHERS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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SUBJECT INDEX

	PAGE
Statement of Case	1
Summary of Argument	2
Reasons for Not Granting the Writ	4
I.	
Wyoming Was Not Delayed by Any Default of Forgey	4
II.	
Western's Duty As Surety On Wyoming's Performance Bond	8
III.	
The Liability of Monolith	12
IV.	
The Applicable Statute of Limitations	17
V.	
Interest Was Properly Allowed On Western's Claim	20
Conclusion	27

TABLE OF AUTHORITIES CITED

Cases

American Surety Co. v. Carbon Timber Co., 263 Fed. 295 (8th Cir. 1919)	25
Binning v. Miller, 60 Wyo. 414, 146 P. 2d 257 (1944)	22
Costan v. Manila Electric Co., 24 F. 2d 383 (2d Cir. 1928)	17
Dawson, Corbett and Shelp v. Lieurance, 68 Wyo. 465, 237 P. 2d 457 (1951)	22

INDEX (CONTINUED)

	PAGE
Fish v. East, 114 F. 2d 177 (10th Cir. 1940)	13
H.A.S. Loan Service v. McColgan, 21 Cal. 2d 551, 133 P. 2d 391, 145 A.L.R. 349 (1943)	13
Herman v. Mobile Homes Corp., 317 Mich. 233, 26 N.W. 2d 757 (1947)	13
Hughes v. Reed, 46 F. 2d 435 (10th Cir. 1931)	19
Industrial Research Corp. v. General Motors Corp., 29 F. 2d 623 (D.C.N. Ohio 1928)	13
Johnson v. Hanover Fire Ins. Co., 59 Wyo. 120, 137 P.2d 615 (1943)	22
Kuhn v. McKay, 7 Wyo. 42, 65 Pac. 853 (1897)	23
Leet v. Joder, 75 Wyo. 225, 295 P. 2d 733 (1956)	26
Taylor v. Standard Gas & Electric Co., 306 U.S. 307 (1939)	13
Wyoming Ry. Co. v. Leiter, 25 Wyo. 286, 169 Pac. 1 (1917)	25

STATUTES

Federal Rules of Civil Procedure, Rule 49(b)	1
Wyoming Statutes, 1957, Section 13-479	26
Wyoming Statutes, 1957, Section 1-16	19
Wyoming Statutes, 1957, Section 1-17	19
Wyoming Statutes, 1957, Section 1-21	19

TEXTS

4 Am. Jur., Limitation of Actions, Section 79	19
51 C.J.S., Limitations of Actions, Section 33	19

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 835

WYOMING CONSTRUCTION COMPANY, a Wyoming corporation; and MONOLITH PORTLAND MIDWEST COMPANY, a corporation,

Petitioners,

vs.

THE WESTERN CASUALTY AND SURETY COMPANY, a corporation; FORGEY CONSTRUCTION COMPANY, a Wyoming corporation; and ORRIN B. FORGEY, RUSSELL FORGEY, CHAS. S. CHAPIN and W. J. McNAMARA, individually and as co-partners doing business as FORGEY BROTHERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF CASE

Respondents adopt as their "Statement of the Case," the statement at the beginning of the opinion of the United States Court of Appeals for the Tenth Circuit. See pages 1 and 2 of Appendix I of Petition.

Insofar as the "Statement" appearing on pages 4 through 6 of the petition purports to be a statement of the case containing the facts material to the consideration of the questions presented it is controverted by these Re-

spondents. The facts which are the subject of the statement are not presented in the true light. The statement of "Questions Presented" on pages 2 and 3 of the petition is subject to the same criticism. Certain facts are assumed in various of the questions which were not found to be true by the jury in the trial of the case. Other facts are given an undue emphasis and are not presented within the framework in which they actually existed.

Statements of facts which Respondents deem necessary to correct inaccuracies and omissions in the statement of petitioners, together with a statement of such facts as are necessary to correct misapprehensions that might result as a consequence of the outline of questions presented submitted by petitioners will hereinafter appear, where appropriate, in the argument of Respondents.

SUMMARY OF ARGUMENT

Respondents will hereinafter demonstrate that Petitioners are attempting to secure a review of adverse factual determinations made by a jury and reviewed by the United States Circuit Court of Appeals for the Tenth Circuit. The petition presents no substantial questions of law.

Wyoming Construction Company, hereinafter referred to as "Wyoming," was not delayed in the performance of its subcontract by any default of Forgey Construction Company, hereinafter referred to as "Forgey." A work site was at all material times available to Wyoming. Wyoming's failure to keep abreast of Forgey in the performance of its obligations under its subcontract was the result of its own acts. The jury found as a fact that Forgey did not delay, obstruct, hinder, interfere or prevent Wyoming from performing. Substantial evidence supports the verdict and the judgment thereon.

Western Casualty and Surety Company, hereinafter referred to as "Western" acted in complete good faith in its relationship with Wyoming. It gave Wyoming every opportunity to perform its contract, but was forced by the default of Wyoming to perform Wyoming's obligations. As a consequence of this performance, Western became entitled to enforce its contractual right of indemnity. Wyoming cannot take advantage of its own wrong by asserting that Western waived a purported defense and thus that Western lost its right to indemnity. The Petitioners' contentions in these respects were resolved adversely to them by the jury. Substantial evidence in the record supports the jury's verdict.

Monolith Portland Midwest Company, hereinafter referred to as "Monolith," acquired ownership of Wyoming during the course of the construction job. By its exercise of dominion and control over Wyoming in its own interest and to the detriment of Wyoming, Forgey and Western, Monolith became liable for Wyoming's contractual obligations. The question of whether Monolith's conduct was such as to render it liable for Wyoming's obligations is a question of fact. This question has been determined in Western's favor by the trier of fact. The determination is supported by substantial evidence in the record.

Western brought suit on a written contract of indemnity. Monolith was joined as a defendant on the theory that, by its conduct, it became liable on the contract of indemnity. Western does not seek to hold Monolith liable on a theory of tort liability. Western's claim against Monolith was asserted well within the time allowed by the statutes of limitation applicable in actions based on a contract, either express or implied.

Western's claim for indemnity was liquidated. Under

the applicable local statute, interest before judgment is recoverable as a matter of law upon liquidated claims. The action of the trial court in allowing interest upon Western's liquidated claim was proper in all respects.

REASONS FOR NOT GRANTING THE WRIT

I.

Wyoming Was Not Delayed By Any Default of Forgey

It has been the contention of Petitioners from the trial of this case, through the Circuit Court of Appeals, and in this petition that November 29, 1951, was the operative completion date of the subcontract between Forgey and Wyoming. This is not the case. In accordance with the principal contract between S. J. Groves & Sons Company and the United States, the subcontract whereby Forgey contracted to do the embankment and riprap work, and the subcontract whereby Wyoming contracted with Forgey to do the riprap work called originally for completion by November 29, 1951 (R. 39). Several provisions were contained in the principal contract itself, however, which recognized circumstances that would result in extensions of time being given (R. 898-902). The Forgey-Wyoming subcontract incorporated and adopted all consistent provisions of the principal contract (R. 37 & 38). Various extensions of time were procured from the Bureau of Reclamation, the last of which expired on July 17, 1952 (R. 842-844). These extensions of time were procured with the assistance and cooperation of all parties concerned, including Wyoming and Western (R. 399, 539 & 540, 601, 718, 720, 825-833, 859-862, 967 & 968, 1027 & 1028). Thus the subcontract completion date became July 17, 1952, not November 29, 1951, as contended by Petitioners.

Forgey served notice upon Wyoming on June 27, 1952,

of Wyoming's default under its subcontract (R. 308 & 309). Until this time the Forgey-Wyoming subcontract continued in force for the benefit of both parties.

At the time the subcontract was executed on or about December 5, 1950, (R. 525), representatives of both Wyoming and Forgey recognized that there was a distinct possibility that the embankment and riprap might not be completed by November 29, 1951, and that extensions of time might have to be procured (R. 740). At its own instance, and with the concurrence of Forgey, Wyoming continued performance under its subcontract on and after November 29, 1951, through the winter of 1951-1952 and into the spring and summer of 1952 (R. 409 & 410, 720, 810, 829-833, 847). This continued performance was an attempt by Wyoming to fulfill its contractual obligations and became necessary as a consequence of Wyoming's own acts.

From the time of negotiation of the Forgey-Wyoming subcontract, the parties contemplated that Wyoming would place riprap on the dam embankment concurrently with the raising of the embankment by Forgey (R. 528, 704 & 705, 744, 804). By the end of July, 1951, Forgey had completed a substantial portion of the embankment and an area was available to Wyoming for the placement of riprap (R. 464-466, 806). A substantially increased amount of slope was available to Wyoming by the end of August, 1951 (R. 799 & 800). During May and June of 1951, Wyoming was repeatedly requested by Forgey to commence preparatory work under its subcontract (R. 632, 806), but such work was not commenced by Wyoming until July of 1951 (R. 568, 806). It was not until August of 1951 that Wyoming opened a road to the quarry from which it was required to procure riprap materials (R. 573, 681, 799). The respective performances of Forgey and

Wyoming are well summarized in the testimony of one of Wyoming's own employees (R. 799-803, 821-823).

On August 31, 1951, Forgey had placed 61% of the embankment materials (Wyoming had placed only .08% of the riprap). Respective percentages of completion for the last day of each of the following months were: September 30, 1951—Forgey 75%, Wyoming 4.5%; October 31, 1951—Forgey 91%, Wyoming 3.8% (R. 340 & 341). On November 30, 1951, Forgey was 93% completed in placing embankment materials; Wyoming was 9.9% completed with the placement of riprap materials (R. 341). Shortly before this date, Forgey had closed down its operation of placing embankment due to freezing conditions which made it impossible to saturate and compact materials in the embankment as required by specifications (R. 687). At its own election, Wyoming continued performance after this date (R. 409 & 410, 615 & 616, 740 & 741, 810 & 811).

Wyoming's failure to keep abreast of Forgey in the performance of the respective obligations of the parties was due to several reasons, among which were: Wyoming's late start in commencing preparatory work (R. 568, 590, 681), lack of adequate equipment (R. 565 & 566, 569 & 570, 591, 597 & 598, 802, 860), inadequate operating capital (R. 741, 765-767) and the expressed desire of the president of Wyoming to work into the winter rather than to pull Wyoming equipment off more profitable jobs (R. 740 & 741).

The president of Wyoming was himself of the opinion that placement of blanket and riprap would proceed more efficiently at a time when the materials in the embankment were frozen (R. 801). Western, Wyoming's surety, knew and approved of Wyoming's plan to continue performance into the winter (R. 409 & 410, 412, 861). Wyo-

ming continued performance under its contract until the middle of June, 1952 (R. 692 & 822 & 823, 834). At this time Wyoming was 43.8% complete with its obligation to place blanket and riprap (R. 638). Forgey had previously finished placement of the embankment materials on May 10, 1952 (R. 838). As above mentioned, Forgey gave notice of default to Wyoming on June 27, 1952, Wyoming having ceased performance under its contract about the middle of June.

Prior to submission of the cause to the jury, the trial court gave two special interrogatories to the jury under Rule 49(b) of the Federal Rules of Civil Procedure. One of these interrogatories is quoted as follows:

> "Did Forgey Construction Company (and the individual third party defendants) . . . obstruct, hinder, interfere or prevent Wyoming Construction Company from laying the blanket and riprap on said dam pursuant to its contract?" (See page 18 of Appendix to Petition.)

The jury, with the evidentiary background discussed above, answered this question in the negative. The evidence supported the jury's determination that Wyoming failed to keep the contemplated pace, failed to correlate its work with Forgey and failed to follow agreed procedures. As determined by the jury, Wyoming was itself at fault, while Forgey was not. The Circuit Court of Appeals for the Tenth Circuit reviewed this evidence when the contention was made by Petitioners that Wyoming was excused from performance of its subcontract because of the alleged breach by Forgey in failing to complete precedent embankment work by November 29, 1951. These contentions were succeintly disposed of by that Court, Justice Breitenstein stating:

> "The record shows that no failure of Forgey to complete the preliminary work hindered or delayed Wyoming and that Wyoming made no effort to keep up with the progress of Forgey. These facts, coupled with extensions of the termination date obtained with the assistance and acquiescence of Wyoming, require the conclusion that no default of Forgey relieved Wyoming of its duty to perform. The situation in which Wyoming found itself was the result of its own acts." (Page 4 of Appendix to Petition.)

It is conceded that a contractor is entitled to a full opportunity to perform his contract and that a materially different performance cannot be imposed upon him, as argued by Petitioners. See page 8 of Petition. In this case, there is no factual basis for the application of this principle. The holding of the United States Circuit Court of Appeals for the Tenth Circuit is in full accord with applicable authorities. There is no conflict whatsoever with the decision of any court on a parallel set of facts.

II.

Western's Duty As Surety On Wyoming's Performance Bond

Petitioners argue that it was obligatory upon Western, as Wyoming's surety, to cause Wyoming, its principal, to cease performance on its contract as of December 1, 1951. Petitioners then argue that "Western's subsequent loss was directly and proximately caused by its failure to assert a known, valid defense on December 1, 1951, knowing the probable consequences." See Page 9 of Petition. This argument completely ignores the evidence in the case and erroneously assumes that a defense existed as of that date which would exonerate Western as surety and excuse nonperformance by Wyoming.

As above demonstrated, no fault on the part of Forgey contributed to the failure of Wyoming to maintain a rate of production which would have enabled it to keep abreast of Forgey in the progress of the work. It was due to Wyoming's own acts that Wyoming was so far behind as of December 1, 1951, that continued performance into the winter was indicated by good business practice. It was Wyoming's own idea to continue performance into the winter; it communicated this plan to Western, its bonding company, and secured the latter's approval.

Western took the course of action which would have been taken by any surety in the same circumstances. It did all in its power to assist Wyoming in the further performance of its contractual obligation. No "valid defense" existed in either Western or Wyoming as of December 1, 1951. Moreover, if such a defense existed, it was known to Wyoming and could have been asserted by Wyoming. Instead, Wyoming desired to work later into the winter for its own benefit, and elected to continue performance of its own free will.

The instant case is not an action by the beneficiary or obligee under a bond against the principal's surety. Rather, this action was by the surety which performed in the place of its principal seeking to enforce against the principal a contractual right of indemnity. The contract of indemnity in question authorized Western, as surety, ". . . to consent, from time to time, to any extensions, modifications, changes or alterations of, or additions to, said contract . . ." (R. 24). Western thus had the contractual right to consent to an extended time of performance particularly when such extension inured to the benefit of Wyoming, its principal.

The only remaining assertion of Petitioners in Point II

of their argument which merits comment is the charge contained therein that the issue of the presence or absence of "good faith" on the part of Western was withdrawn from the jury by the trial court. This is not true. By rendering a general verdict in favor of Western and against Wyoming and Monolith, the jury, under appropriate instructions (R. 141-143, 148, 876 & 877, 880) found that Western acted in good faith at all times. This issue unquestionably remained in the case, despite Petitioner's continued contention that the issue was withdrawn as a consequence of the submission of two special interrogatories to the jury (R. 137, page 18 of Appendix to Petition). These interrogatories were given under and by authority of Rule 49(b) of the Federal Rules of Civil Procedure. The answers given by the jury thereto were consistent with each other and consistent with the general verdict. By express provision in the Rule, interrogatories need not be given on every issue in the case. Accordingly, there is no error whatever in submitting interrogatories on some but not all of the issues of fact present in a case. Moreover, Petitioners are in no position to assert that the giving of these interrogatories was error. The interrogatories exemplified the precise issues upon which the defendants below sought to make out a defense and were a proper statement of the more important issues in the case. Counsel for Petitioners was aware of the "general substance" of what was to be contained in the interrogatories substantially in advance of the time that they were given (R. 894 & 895). Had counsel desired to make objections, suggest changes, or submit additional interrogatories on other issues, this could have been done. Not having done so, any error was waived.

In their appeal to the Circuit Court of Appeals, Petitioners raised the same argument as is contained in Point

II of the petition. In disposing of these arguments, and after examining voluminous evidence, the issues were resolved adversely to Petitioners, Judge Breitenstein stating with respect thereto that:

> "The equities of the situation cry out against Wyoming. By starting late and using inadequate equipment it failed to keep abreast with the progress of Forgey. It led all parties to believe that by winter work it would catch up with Forgey and complete the riprap promptly after the completion of the embankment. It did not object to the extensions but instead aided in their procurement. It failed to do the job it had contracted to do. Now, after the work has been completed by its surety and the surety seeks indemnity, Wyoming asserts that the situation which resulted from its wrong relieves it of liability to its surety. Such argument does not commend itself to the court. A party may not take advantage of its own wrong.
>
> "* * *
>
> "Wyoming further says that Western breached its duty to act in good faith. We have no doubt that a surety must act in good faith in its dealings with its principal. In the situation here, Wyoming knew the facts at least as well as its surety. The legal rights and obligations arising from those facts were known to both. There is no evidence of misrepresentation, concealment, overreaching or undue persuasion on the part of Western. To the contrary, Western acted with candor and patience and gave Wyoming every opportunity to perform its contract." (Pages 6 and 7 of Appendix to Petition.)

As with Point I of the petition, the resolution of the

questions raised in Point II depended upon a determination of facts. These facts were passed upon by a jury in the trial court and were reviewed by the Court of Appeals. In both instances, these factual issues were resolved adversely to the present Petitioners.

III.

The Liability of Monolith

In arguing that Monolith was improperly held responsible for Wyoming's contractual obligation of indemnity, Petitioners again ignore factual determinations made by a jury and reviewed by the Court of Appeals. Petitioners again indulge in factual assumptions contrary to the true facts as shown by the record.

Petitioners argue that Wyoming was financially responsible. The only competent evidence introduced in the trial indicates the contrary (R. 275, 577, 593-595, 621-623, 636, 725 & 726, 737 & 738, 741, 765-767, 796-798, 813, 834, 837, 851 & 852, 916 & 917, 1006 & 1007). No evidence was introduced which would indicate that Wyoming was financially responsible to the extent necessary to satisfy its obligation of indemnity, either at the time when the obligation first accrued or at any subsequent time.

Petitioners contend that it was undisputed at the trial of this case that Monolith was free from "fraud or wrong doing." See page 11 of Petition. This contention is contrary to the record. No showing of actual fraud, as such, was made by plaintiff Western at the trial. There was a showing, however, of such conduct on the part of Monolith as would justify application of the instrumentality theory, hereinafter referred to. No concession was ever made that Monolith was guilty of no wrongdoing whatever.

Evidence in the record sustains the propriety of the

jury's verdict in favor of Western and against Monolith under the instrumentality theory described by the Supreme Court of the United States as not properly a rule

> "... but a convenient way of designating the application in particular circumstances of the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when so to do would work fraud or injustice." *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 307, 322.

The applicability of this theory is a question within the province of the trier of fact. See *H.A.S. Loan Service v. McColgan*, 21 Cal. 2d 551, 133 P. 2d 391, 145 A.L.R. 349; *Herman v. Mobile Homes Corporation*, 317 Mich. 233, 26 N.W. 2d 757; *Industrial Research Corp. v. General Motors Corporation*, 29 F. 2d 623 (D.C. N.D. Ohio); *Fish v. East*, 114 F. 2d 177 (10th Cir.); *Costan v. Manila Electric Co.*, 24 F. 2d 383 (2d Cir.).

The following is a summary of the more important evidentiary matters relevant to the issue. At the time that Wyoming entered into the sub-contract with Forgey, one Joe Wheeler was the president of Wyoming. He and his wife were the owners of substantially all the capital stock of Wyoming (R. 522-523, 594). At this time and at all subsequent times there was a very close community of interest between Wyoming and Monolith, Wyoming deriving a large portion of its income from operations conducted for the benefit of Monolith (R. 410 & 411, 442, 521 & 522, 861). Monolith was dependent for its gypsum supply in its Laramie operation upon supplies controlled by Wyoming (R. 493 & 494, 509 & 510). A substantial portion of the equipment owned by Wyoming remained dedicated to Monolith's operation in Laramie although the same was

needed upon the riprap job (R. 509, 515-517, 568-570, 591 & 592). In the winter of 1952 Monolith loaned Wyoming $25,000.00, which loan Wheeler, the president of Wyoming, considered to be an initial advance on a $75,000.00 open line of credit (R. 594). As a part of this transaction, and at the direction and insistence of Monolith, Wyoming completely surrendered its power to conduct its own business without the prior consent and approval of Monolith (R. 414-417, 915-917). All Wyoming stock was pledged to Monolith as security for the advance, with a right to repurchase on payment of outstanding loans, which right was never exercised (R. 593-595, 617, 619-623, 914-918). Wheeler continued as president of Wyoming until May of 1952 but his efforts to complete the Forgey contract were completely frustrated by Monolith (R. 276-278, 605, 617-625, 637 & 638, 1031). Although the initial $25,000.00 loan was considered by Wheeler to be an advance on an open line of credit, Monolith refused any further assistance (R. 593-595, 619-623). Wheeler was prevented from securing outside financing by restrictions placed upon Wyoming's borrowing capacity at the time of the initial loan, except with the consent and approval of Monolith (R. 417, 912 & 913). In effect, Monolith secured 100% stock ownership of Wyoming by advancing only $25,000.00 in return for which a pledge of Wyoming's stock was exacted (R. 593-595, 619-623, 914, 918).

After Wheeler's resignation had been forced by Monolith, a Monolith employee took over the actual supervision of Wyoming's activities (R. 470, 605). This person assured Forgey and Western that Monolith would either take over Wyoming's contract or would supply financial backing for Wyoming to complete the job (R. 470 & 471, 798, 911). These representations never materialized. Instead, about the middle of June, 1952, this employee of Monolith

shut down the job and caused Wyomfug's equipment to be "stacked" (R. 451, 479, 692 & 693, 759-762, 822 & 823, 834). On June 16, 1952, this same employee was elected as vice-president of Wyoming and was appointed as general manager with full power to rescind any act or contract of the officers, agents and employees of Wyoming (R. 926). Representations were again made that Monolith would complete Wyoming's contract or assist Wyoming in its completion (R. 284, 309 & 310). Again, these representations failed to materialize. As a consequence, and while the job was still shut down, Forgey gave Wyoming notice of default on June 27, 1952 (R. 308-311) and called upon Western to perform on Wyoming's bond (R. 310 & 311). Western called upon Wyoming for exoneration (R. 285) but was able to induce no further action other than continuing assurance that Monolith was still considering taking over the job (R. 837 & 838). On July 14, 1952, a meeting was held for the purpose of determining who was to prosecute the contract to completion (R. 285 & 286, 734). Representatives of all interested parties, including representatives of Forgey, Western, Wyoming, Monolith and the Bureau of Reclamation attended the meeting. At this meeting, Monolith refused to guarantee Wyoming's performance of its contract. A Monolith executive, not in attendance at the meeting, when contacted by telephone refused to authorize a commitment by Wyoming for Wyoming to complete its contract (R. 287, 772 & 773, 779-781). Another executive of Monolith, in attendance at the meeting, demanded that penalties be waived as a condition to either Wyoming or Monolith commiting themselves to complete the job (R. 781). Neither of these last two mentioned executives were officers or directors of Wyoming. On July 15, 1952, a Monolith employee again contacted a representative of Western, acknowledging that Wyoming-Mono-

lith had been "off-base" in demanding a waiver of penalties. An offer was made to commit Wyoming to complete the job if Western would advance the necessary cash (R. 850-852). The offer was refused, and Western completed the job.

The facts show a clear detriment to Western. Wyoming was denied the opportunity to complete its own contract. The job could have been finished by July 17, 1952, the ultimate contract completion date, had Wyoming been allowed to proceed unhampered with its performance during the spring and early summer of 1952. As it was, Western was forced to complete the contract during the season remaining after mid-July at a cost of $74,677.33. Penalties at the rate of $250.00 per day were assessed by the Bureau of Reclamation from July 17, 1952, to the October date when Western completed the contract (R. 295, 342, 336). Respondents submit that costs incurred in the amount of $74,677.33 as a result of being forced to complete Wyoming's contract is certainly a detriment and is without a doubt the proximate result of Monolith's conduct in refusing authorization for Wyoming to complete its contract.

The facts are ample to justify the conclusion that Monolith exercised its means of dominion and control over Wyoming for its own benefit and in its own interest and to the detriment of Western, Forgey and Wyoming. Wyoming is wholly owned by Monolith. Had Monolith (and Wyoming) sustained their defense in the trial court, this ownership would be free and clear of contractual obligations incurred by Wyoming and accruing to Western as a direct result of the conduct of Monolith. When Monolith elected to pursue the course that it did, it was chargeable with the possible consequences. As so aptly stated by Justice Breitenstein:

"The assumption of ownership and control of Wyoming was to the advantage of Monolith because of the gypsum contract which Monolith had made 'through desperation' when it lost its prior source of supply and which was profitable to Wyoming. The decision to proceed no further with the Forgey contract was a detriment to Western as it was obligated under its performance bond. The facts justify the conclusion that Monolith was using Western (sic "Wyoming") and its property to the sole advantage of Monolith. That advantage was served by the abandonment of the Forgey contract.

"Monolith emphasizes that there was no evidence of fraud but it is enough if the disregard of the corporate entity is required to prevent injustice. The issue was submitted to the jury under instructions, which, when taken as a whole and considered in their entirety, fairly and adequately set out the controlling principles. There was substantial evidence from which the jury could find that Monolith controlled and dominated Wyoming in the interest of Monolith and with full knowledge of the situation caused Wyoming to default on the Forgey contract with resulting detriment to Western. The verdict of the jury is sustained. It would be inequitable and unjust to permit Monolith to escape the consequences of its conduct." (Pages 10 & 11 of Appendix to Petition.)

IV.

The Applicable Statute of Limitations

Petitioners are in error in asserting that the amended complaint joining Monolith as a party defendant was ordered filed ex parte. Actually, by written motion served on counsel for Petitioner herein, Western moved on Octo-

ber 18, 1957, for permission to file an amended complaint for the purpose of adding Monolith as a defendant (R. 87-89). This motion was filed October 21, 1957 (R. 89). By their own admission, Monolith's counsel received the notice of motion but elected not to present argument (R. 108 & 109). The motion was heard on October 29, 1957, and an order, dated and filed the 29th of October, 1957, authorized the filing of the amended complaint. Subsequently an amendment was filed to the amended complaint, said last amendment being filed November 26, 1957, (R. 128, 130) and served upon counsel for Monolith - Wyoming at that time. These amendments were found to be necessary in furtherance of justice.

The amended complaint, together with the amendment to it pleaded facts sufficient to state a claim for relief on the ground that separate corporate entities will be disregarded where a parent corporation dominates and controls a subsidiary in its own interest and to the detriment of the subsidiary and third parties to the extent that recognition of distinct entities would result in wrong or injustice (R. 93, 94, 128-130).

In arguing throughout this case that Western's claim for relief is barred by the statute of limitations, petitioners have persistently refused to recognize that Western's claim is not founded upon a theory of tort liability. It was alleged in Western's complaint that Monolith had acted fraudulently, but this allegation was made only in conjunction with other specific allegations ample, if proved, to show a right to relief upon the ground that by its conduct Monolith became responsible for its wholly owned subsidiary's contractual obligations. The judgment in favor of Western and against Monolith rests upon this ground.

A standard general indemnity contract was executed

by Wyoming at the time Western became surety upon Wyoming's performance bond (R. 23-27). Western, as surety, became obligated to perform under this bond upon the default of Wyoming. Through its exercise of dominion and control over Wyoming in its own interest, to the detriment of Wyoming, Forgey, and Western, Monolith became liable on this same contract under the instrumentality theory. The amended complaint, and the amendment thereto, filed October 29, 1957, and November 26, 1957, respectively, were timely under the applicable statutes of limitation. Western's claim for relief did not accrue until it had performed as surety under the performance bond. This performance was commenced only after July 14, 1952, and was not completed until October of 1952. Under Wyoming statutes, an action may be brought on a written contract within ten years after the cause of action accrues. Section 1-46 *Wyoming Statutes*, 1957. On oral contracts, either express or implied, an 8-year statute applies. Section 1-17, *Wyoming Statutes*, 1957. On actions for relief not otherwise limited, a ten year statute applies. Section 1-21, *Wyoming Statutes*, 1957. Clearly, this action was founded upon a contractual theory of liability and not upon a theory of liability in tort. Where there is doubt in this respect, courts universally apply the longer period of limitations applicable in actions founded upon a contract. See e.g. *Hughes v. Reed*, 46 F. 2d 435 (10th Circuit); 34 Am. Jur. *Limitation of Actions*, Section 79; 53 C.J.S. *Limitations of Actions*, Section 33. The decision of the Circuit Court of Appeals affirming the trial court on this point is consistent with all authorities upon the subject.

V.

Interest Was Properly Allowed Upon Western's Claim

In its original complaint, Western set out a claim for $74,677.29 (R. 13). The prayer of the original complaint was for only $74,667.29, as was the prayer in the subsequent amended complaint (R. 13, 94). This discrepancy was the result of typographical error. The actual and the exact claim of Western was for $74,677.33 (R. 378). In his closing argument, Western's counsel requested the jury to render a verdict in favor of Western in the amount of $74,677.33 (R. 873). The jury rendered a verdict in this precise amount (R. 137). The discrepancies in the pleadings were not brought to the attention of the jury since the pleadings were not made available to them on their retiring (R. 889). Petitioners now seek to take advantage of these discrepancies by asserting that the jury's verdict differed from both the "claim" on which interest was allowed, and the prayer. Page 15 of Petition. This assertion is founded upon circumstances so inconsequential as not to require further comment.

Under and by authority of Section 13-479, *Wyoming Statutes*, 1957, the trial court gave judgment for interest at the statutory rate of 7% per annum upon the verdict of the jury, as prayed for in the amended complaint (R. 94). Section 13-479 is quoted as follows:

> "On money due on any instrument in writing, in the absence of contract specifying the rate, or on settlement of an account from the day balance shall be agreed upon; on money received to the use of another, and retained without the owner's consent, express or implied, from the receipt thereof, and on money loaned or due, and withheld by unreasonable delay of payment, interest shall be allowed at the rate of seven

per cent, per annum. Unsettled accounts shall bear interest after thirty days from the date of the last item thereof."

Contrary to statements of counsel in the petition, the action of the trial court in giving judgment for the amount of the verdict plus interest was not ex parte. Actually, the trial court called for memorandum briefs on the interest question and Petitioners filed their brief, entitled "Memorandum re Interest" on December 19, 1957. Only after the parties were heard through their briefs did the court decide the question and grant judgment for plaintiff on this issue. The memorandum of the trial court advising of the decision, addressed to all attorneys of record, was dated December 23, 1957, the date the judgment was filed herein. See pages 19 through 23 of Appendix to Petition. The charge that the trial court acted ex parte is without foundation.

As indicated above, the jury's verdict was for the precise amount of Western's claim. The form of verdict presented to the jury contained no reference to interest (R. 137). Neither party requested an instruction on the matter of interest.

This action was an action for money due on an instrument in writing. Under the terms of the contractor's general indemnity executed by Wyoming, Wyoming was obligated to indemnify Western against all loss, costs, damages, attorney's fees and expenses of whatever kind or nature which might have been incurred by Western in good faith as a consequence of a default by Wyoming (R. 23-26). Where the terms of such a written contract furnish the measure of responsibility, a claimant is clearly entitled to interest on the amount of his claim under and by virtue of Section 13-479, supra.

Petitioners attempt to show that the action of the trial court, affirmed by the Court of Appeals, is in conflict with applicable Wyoming authorities. There is no conflict. Petitioners cite and rely upon various Wyoming Supreme Court decisions holding that a claimant is not entitled to interest, within the terms of the statute quoted above, where the claim is *unliquidated*. See *Dawson, Corbett & Shelp v. Lieurance*, 68 Wyo. 465, 235 P. 2d 457; *Binning v. Miller*, 60 Wyo. 114, 146 P. 2d 257; *Johnson v. Hanover Fire Ins. Co.*, 59 Wyo. 120, 137 P. 2d 615. The one fundamental distinction between these cases and the present case is that the claim in this case is liquidated. The *Dawson* decision is illustrative of this distinction. It concerned an action for an accounting between a contractor and his subcontractor, in which each party asserted monetary claims against the other. Issues were present with respect to the actual terms of the governing contracts, as well as with respect to the rights of the parties thereunder. The testimony addressed by the parties was irreconcilable and conflicting. As stated by the Wyoming Supreme Court on page 485 of the official report:

> "The litigation before us is really an accounting action involving mutual claims for *unliquidated* damages and items which were sharply disputed by both parties which neither would concede as due from one to the other and which required evidence to be submitted and the determination of the District Court had before it was established as certain what was due from one to the other. Under such circumstances and under the authorities to which we now call attention we think interest amounts were, as indicated above, erroneously allowed to plaintiffs." (Emphasis supplied)

The Wyoming Supreme Court in the *Dawson* case reviewed various authorities in support of their conclusion

that the claim of plaintiff had been unliquidated. It was indicated in the opinion that the test of whether a claim is liquidated, as opposed to unliquidated, is whether the claim is of such a fixed and determinate amount that payment thereof can be tendered and the running of interest thereby stopped. Decisions to the effect that a debt is deemed liquidated when it is certain how much is due and when it is due were cited with approval. See also *Kuhn v. McKay*, 7 Wyo. 42, 65 Pac. 853, on the same points.

Petitioners cannot in good faith argue that they did not know the amount of Western's claim as of January 23, 1953, since Western furnished a detailed and comprehensive accounting of its claim against Wyoming on that date (R. 359, 373 & 374, Exhibit 7).

This voucher contained a complete account of Western's expenses in completing Wyoming's contract, including full details with regard to expenditures and receipts (R. 290, 373 & 374). The total loss figure shown in the exhibit was $82,228.81.

Wyoming-Monolith made no protest as to the reasonableness of the expenses incurred by Western, as evidenced by the voucher. Instead, Western was notified that Wyoming considered itself free from liability for indemnity and that Wyoming intended to maintain the position it had assumed on July 17, 1952, i.e., that Western had arbitrarily taken over Wyoming's contract and that Wyoming was not liable for indemnity (R. 305, 360).

Monolith retained independent accountants and auditors to review Western's records in support of the amounts included in Exhibit 7 (R. 937-950). The resulting report was submitted to an executive of Monolith on March 31, 1953 (R. 937). The report contained the statement that the net job cost (as opposed to the total loss figure shown

in Exhibit 7 of $82,228.81) as of February 23, 1953, was $79,691.26. Miscellaneous adjustments due to occurrences taking place after the voucher was submitted account for the difference in the two figures. Subsequent adjustments (matters of mathematical computation only) reduced Western's loss figure to $74,677.33. These adjustments (e.g. R. 380) were largely consequent upon a successful effort by Western to obtain rebates on part of the penalties which had been assessed. This took place after the submission of Exhibit 7 and was therefore not reflected therein. The rebate of penalties and other miscellaneous adjustments inured to the benefit of Wyoming and Monolith since the total amount of the claim was thereby reduced.

From and after January 23, 1953, the present Petitioners were possessed of knowledge of the exact amount of Western's claim, computed precisely in accordance with the terms of the written contract of indemnity. The petitioners are in no position to complain that the ultimate loss figure, through the efforts of Western, was reduced from $82,228.81 to $74,677.33. Had the present petitioners paid or tendered payment of Western's loss in accordance with the voucher submitted on January 23, 1953, the running of interest would have been stopped. The petitioners then could have taken such action as they desired in processing negotiations and prosecuting claims which resulted in favorable adjustments. Instead, Wyoming at the behest of Monolith, continued to claim that Western had arbitrarily taken over Wyoming's contract and that Wyoming had a complete defense to Western's claim for indemnity (R. 324-339).

Again contrary to Petitioners present argument, neither Monolith nor Wyoming ever questioned the amount of Western's expenditures, nor did these parties introduce

any evidence showing that Western had not actually expended the amounts which it claims to have expended. It was not until after suit was filed that the reasonableness of the expenditures was attacked, and then only in conjunction with the primary defense that there existed no liability for indemnity. As above indicated, these Petitioners had always maintained that a complete defense existed to Western's claim. The belated attack upon the reasonableness of Western's unquestioned expenditures was and is not well founded, since Western had the right under its contract of indemnity to recover all amounts expended by it in good faith. The jury, by its general verdict in favor of Western, found that Western had at all times acted in good faith.

Petitioners' contentions throughout the trial of the case, and in arguing the appeal to the Circuit Court, to the effect that Western had no right of indemnity does not make Western's claim unliquidated. As held by the Tenth Circuit Court of Appeals, the fact that a claim is disputed does not preclude the recovery of interest. This conclusion finds support in a decision of the Supreme Court of Wyoming, that of *Wyoming Ry. Co. v. Leiter*, 25 Wyo. 286, 291, 169 Pac. 1, in which case the Court made the observation:

> "The argument amounts to this: that plaintiff could not pay because it did not know the amount due for the reason that it objected to the amount found due. A very handsome method of avoiding the payment of interest on one's debts."

The decision allowing interest on the judgment in this case is consistent with the governing statute, construed in accordance with local decisions. The decision also parallels that rendered in *American Surety Co. v. Carbon Timber Co.*, 263 Fed. 295 (8th Cir.), which also involved a con-

struction of the same Wyoming statute on interest. The action was also by a surety against its principal for indemnity, the surety having performed on the default of its principal. The trial court had disallowed interest prior to judgment and was reversed in this respect by the Court of Appeals. The argument had been made that the plaintiff's claim was unliquidated and therefore not within the purview of the Wyoming statute. The Court of Appeals (at a time when the District of Wyoming was within the Eighth Circuit) in disposing of this question held:

> "The amount was ascertained under and by virtue of specific authority of the terms of the contract entered into between the Surety Company and the Timber Company, and, having been definitely ascertained, was paid by the plaintiff. This is undisputed. It follows that the amount so paid by the plaintiff to the United States was then due from the defendant to the plaintiff. It required no act of either plaintiff or defendant Timber Company to make the amount due definite and certain, and the time that it became due was the time of payment by plaintiff. Certainly, therefore, it was a liquidated debt."

The only inhibition placed upon the power of a court to add interest to a verdict, as expressed in *Leet v. Joder*, 75 Wyo. 225, 295, P. 2d 733, is that a court may not add interest where the same is a part of the damages or where it is impossible to ascertain whether the jury has included interest in the award on an unliquidated contract or claim. As held by the Circuit Court of Appeals, the present action does not come within either inhibition. The right to interest followed here as a matter of law, there being no question of fact involved. Interest was properly allowed by the trial court.

CONCLUSION

The primary issues in this case are issues of fact. These issues were determined adversely to Petitioners by a general verdict of a jury in favor of Respondents and against Petitioners, upon which judgment was entered. Evidence in support of the jury's verdict was examined by the United States Court of Appeals for the Tenth Circuit. The verdict of the jury was found to be sustained in all respects and the judgment entered thereon was affirmed. The petition raises no substantial question in view of the evidence in the record.

The judgment is in complete accord with the local law applicable to parallel facts. The decision of the United States Court of Appeals for the Tenth Circuit is in full accord with its own previous decisions and with the decisions of other Courts of Appeal on the same matters. There are no special or important reasons for granting review on certiorari.

For the foregoing reasons, Respondents respectfully request that this petition for a writ of certiorari be denied.

Respectfully submitted,

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